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## EASTERN DISTRICT OF TEXAS

DECIDERIO MARBAN CALDERON,

Movant,

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Versus

CIVIL ACTION NO. 1:09-CV-761

White States of America,

Respondent.

## MEMORANDUM ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Movant Deciderio Marban Calderon, an inmate at the Cedar Hill Unit in Big Spring, Texas, proceeding *pro se*, brought this motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

The court referred this matter to the Honorable Earl S. Hines, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends the motion be dismissed without prejudice.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings and all available evidence. No objections to the Report and Recommendation of United States Magistrate Judge were filed by the parties.

Furthermore, the movant is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the movant to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the movant need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a

court could resolve the issues in a different manner, or that the questions presented are worthy of

encouragement to proceed further. See Slack, 529 U.S. at 483-84. Any doubt regarding whether

to grant a certificate of appealability is resolved in favor of the movant, and the severity of the

penalty may be considered in making this determination. See Miller v. Johnson, 200 F.3d 274,

280-81 (5th Cir.), cert. denied, 531 U.S. 849 (2000).

Here, the movant has not shown that any of the issues raised by her claims are subject to

debate among jurists of reason. The factual and legal questions advanced by the movant are not

novel and have been consistently resolved adversely to her position. In addition, the questions

presented are not worthy of encouragement to proceed further. Therefore, the movant has failed

to make a sufficient showing to merit the issuance of a certificate of appealability. Accordingly,

a certificate of appealability shall not be issued.

ORDER

Accordingly, the findings of fact and conclusions of law of the magistrate judge are

correct, and the report of the magistrate judge is ADOPTED. A final judgment will be entered

in this case in accordance with the magistrate judge's recommendation.

SIGNED at Beaumont, Texas, this 30th day of November, 2009.

MARCIA A. CRONE

Maria a. Crone

UNITED STATES DISTRICT JUDGE

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